

CASE NO.

91-289

Supreme Court, U.S.
FILED

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IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER, 1991 TERM

BURRELL INDUSTRIES, INC.,
(f.k.a. OHIO RIVER SAND
& GRAVEL COMPANY),

Petitioner,

v.

CONTRACTORS SUPPLY CORP.,

Respondent.

ON WRIT OF CERTIORARI TO THE
WEST VIRGINIA SUPREME COURT OF
APPEALS AND THE CIRCUIT COURT
OF OHIO COUNTY, WEST VIRGINIA

RESPONDENT'S BRIEF IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

(1) Whether a state court violates a party's rights under the due process clause of the Fourteenth Amendment to the United States Constitution by implementing procedures other than a hearing, including curative instructions and individual polling of the jurors, to prevent jury bias and to determine whether any such bias exists, where a juror has disclosed to the court that a potential for bias toward one of the parties may exist, and no objection was placed upon the record.

(2) Whether the absence of appellate review as a matter of right under state law constitutes a violation of rights under the due process clause of the Fourteen Amendment to the United States Constitution.

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STATEMENT OF THE CASE

The subject case arises out of a contract dispute tried before the Circuit Court of Ohio County, West Virginia. This contract case involved the sale of aggregate materials, such as sand and gravel, which are used in the construction business. The petitioner was the seller in this arrangement, and respondent¹ was the buyer. The case was bifurcated, the first portion of the trial being held in July of 1988 on the question of which of two written documents constituted the operative contract. The two documents were designated "Contract A" and "Contract B." At the end of the first portion of the trial, the jury found that "Contract A" was the operative contract.

¹Rule 29.1 Note - Respondent, Contractors Supply Corp., has no parent or subsidiary companies.

The second portion of the trial was held in November of 1988 before the same judge and jury. The jury was then asked to determine whether either party had breached the terms of "Contract A." If the jury found the contract had been breached, it was then to determine what damages had resulted. The jury found that the contract had been breached by the plaintiff, petitioner herein, and awarded the defendant, respondent herein, the amount of \$100,000.00 upon its counterclaim.

On the morning of the second day of the second portion of the trial, one of the jurors approached the trial judge and stated to the judge that she, or some other members of the jury, had "feelings" about one of the parties that could possibly prevent the jury from reaching a fair verdict. The juror also indicated that those feelings had been generated by

evidence heard in the first portion of the trial. The juror also stated that she wondered whether there would be feelings about one of the parties being a big corporation versus the other party which was a small corporation. The trial judge did not immediately inform counsel for the parties about her conversation with the juror. However, the judge did notify counsel of this conversation while the jury was deliberating. The trial judge informed the parties that she had instructed the juror on the necessity of making a determination in the case based solely upon the evidence, and that she had included curative instructions in the charge to the jury. Neither party, by their counsel, made any motions throughout the time that the jury was deliberating. A verdict was then returned in favor of the defendant, respondent herein, for the amount of \$100,000.00, upon its

counterclaim. The trial judge then polled the jury and asked each of them if their verdict was based solely upon the evidence. Each of the jurors individually indicated that his or her verdict was for the defendant, respondent herein, and that his or her verdict was based solely upon the evidence produced at trial. Several days after the conclusion of the trial, on November 23, 1988, the petitioner filed motions for judgment notwithstanding the verdict and for a new trial, which included a request for a hearing to determine the scope, extent and duration of any jury bias.

The trial judge made a request to the Supreme Court of Appeals of the State of West Virginia to recuse her from a consideration of those parts of petitioner's motion for new trial which dealt with the issue of her conversation with the juror. The Supreme Court of West

Virginia granted this request and appointed a trial judge from another circuit to decide the issue. That judge examined the curative instructions given by the trial judge, the polling of the jury, the nature of the juror's statement to the judge as related by the trial judge, and also the fact that no objections were presented prior to verdict regarding the inclusion of the subject juror on the panel or to the deliberation by that panel of the issues presented. Based upon his review of all these considerations, the special judge found that the petitioner herein received a fair trial which was free of bias or prejudice, and therefore, denied the motion for a new trial upon the grounds of alleged jury bias.

Petitioner herein subsequently petitioned the Supreme Court of Appeals of the State of West Virginia to hear an

appeal of its case. However, that court, in its discretion, declined to grant the petition. Petitioner filed its petition for writ of certiorari to the United States Supreme Court on July 1, 1991. That petition presents two issues framed by the petitioner: the first dealing with a due process right under the Fourteenth Amendment to a hearing to determine the scope and extent of jury bias, and the second inquiring whether, under the facts of the present case, the absence of an appeal, as a matter of right under state law, violates the petitioner's due process rights.

An application for stay, filed by the petitioner on July 12, 1991, was denied by the Honorable Justice Rehnquist on July 23, 1991.

ARGUMENT - REASONS FOR DENYING WRIT

(1) THE TRIAL COURT'S DENIAL OF THE PETITIONER'S REQUEST FOR A HEARING ON THE JURY BIAS ISSUE DOES NOT VIOLATE THE DUE PROCESS RIGHTS OF THE PETITIONER SINCE ADEQUATE ALTERNATIVE MEASURES WERE TAKEN BY THE COURT TO INSURE A FAIR TRIAL, AND THE PETITIONER FAILED TO MAKE A TIMELY OBJECTION UPON THE RECORD.

The respondent agrees that all parties to litigated actions have the right to fair trials in fair tribunals, which includes the right to an impartial and unbiased finder of fact. It is respondent's position that in this case the trial court took adequate precautions to insure that the verdict rendered was reached without the influence of any improper bias.

In the proceedings before the trial court, at the conclusion of the closing arguments, and just after the jury had retired to the jury room to begin deliberations, the judge informed counsel and the parties, in open court and on the record, that she was approached on the

morning of the second day of the second portion of the trial, by one of the jurors regarding the juror's concerns about one of the parties and whether a fair verdict could be returned. The judge related the conversation between herself and the juror as follows:

. . . she started out by making a statement to me that she didn't think that there could be a fair trial in the case and I said, "Why?" And she said-I don't know if she said we or they-had feelings about one of the parties that would possibly prevent them from giving a fair verdict. And I said, "Are those feelings feelings that were personal to the jurors before they were selected to serve on the jury originally, or feelings that were generated because of sitting through the prior trial in this case?" And she said it was, I said, "Based on the evidence you heard at the last case?" And she said, "Yes, it was based on the evidence in the previous case." And I said, "all the jurors will be instructed that personal opinions not based on the evidence cannot be considered by them in reaching the verdict at trial." And I decided to emphasize that in the final

charge. [Trial Transcript II, pp. 470-471].

. . . This juror also stated she wondered whether there would be feelings about this being a small corporation versus a big corporation and I told her that they would be instructed in regard to that and that's the reason I threw into the final charge the point that it makes no difference if it's a small corporation versus a big corporation. [Trial Transcript II, p. 471].

When the Court informed counsel and all parties of her conversation with one of the jurors, there was no objection by petitioner. The judge made the disclosure before the jury returned its verdict and petitioner could have moved for a mistrial or made other motions or requests concerning the statement at that time, but it chose to remain silent. As a result of its silence, petitioner waived all subsequent remedial actions with respect to juror bias or prejudice. See syl. pt. 5, McGlone v. Superior Trucking, 363 S.E.2d 736 (W. Va. 1987). Silence, where

there is a duty to speak, may result in waiver of one's right. See generally syl. pt. 3, Steinbrecher v. Jones, 151 W. Va. 462, 153 S.E.2d 295 (1967). A waiver is the voluntary, intentional relinquishment of a known right, and implies an election by a party to give up something of value or to forego some advantage which it might, at its option, have insisted on and demanded. Nationwide Mut. Ins. Co. v. Smith, 153 W. Va. 817, 172 S.E.2d 708 (1970); and see syl. pt. 3, Hoffman v. Wheeling Sav. & Loan Ass'n, 133 W. Va. 694, 57 S.E.2d 725 (1950); Smith v. Bell, 129 W. Va. 749, 41 S.E.2d 695, (1947).

The trial notes of counsel for respondent reflect that the jury retired to the jury room at approximately 2:45 p.m. Immediately thereafter, the judge made her statement concerning the juror. At approximately 3:45 p.m., the jury returned to the courtroom with a question

which resulted in the judge's rereading of the entire charge to the jury. The jury then retired again to the jury room, and at approximately 4:55 p.m., it returned again to the courtroom with another question, this one dealing with the type of verdict it might return. This question was answered and the jury again retired to the jury room, returning to the courtroom at approximately 5:25 p.m. with its verdict. At no time between 2:45 p.m. and 5:25 p.m. did petitioner make any kind of motion or request to the court regarding the judge's statement concerning the juror.

By failing to timely object to the judge's disclosure, petitioner chose to gamble on the outcome of the trial. Since its gamble resulted in a verdict for respondent, petitioner cannot now claim that it was deprived of a fair trial. To constitute a waiver of right, the right

must exist, the party charged with the waiver must know of the right's existence, and there must be a voluntary intention to relinquish it. Hoffman, supra. Petitioner had the right to object, move for a mistrial, or make some other type of motion when the judge made her disclosure, but it voluntarily chose to relinquish that right.

It cannot be seriously argued that the potential prejudice of the jury could not have been remedied prior to the verdict. Upon motion of the petitioner, the juror might have been questioned before counsel to determine the possible existence, extent and communication to other jurors of her potentially prejudiced attitudes. If any bias existed, she might have then been excused from the jury and replaced by one of the alternate jurors who had already heard all the testimony in the case. Thus, any misconduct of the

inquiring juror might have been corrected if petitioner had simply taken action at the time the judge disclosed her conversation with the juror, but petitioner's failure to take timely action constitutes an affirmative waiver of all objections on this account. McGlone v. Superior Trucking Co., supra, at 745.

In a similar setting, it has been held that a defendant cannot gamble on a favorable verdict before urging a communication with the jury as error, but must make a prompt objection and motion for mistrial or he will lose any advantage to be gained by it. State v. Roden, 216 Or. 369, 339 P. 2d 438 (1959). Although the communication with a juror in the current case took place between the judge and the juror, not between a witness or counsel and a juror, the result remains the same.

Petitioner had full knowledge of its right to place a timely objection on the record as soon as the judge disclosed her communication with the juror. By its conduct, it relinquished that right with full knowledge of the effect of its actions. Petitioner abandoned and surrendered its right to move for a mistrial based upon its failure to object and cannot now raise that it was denied a fair trial or that it was denied an opportunity to address its concern. Its actions clearly represent a waiver of all subsequent remedial actions.

The jury's verdict in the second portion of the trial was consistent with its verdict in the first portion and was supported by the evidence. Even a poll of the jury after the verdict was rendered showed unanimity of assent, and each juror stated that the verdict was based strictly on the evidence. Examining the jury by

the poll is the most generally recognized means of ascertaining whether they are unanimous in their decision. 76 Am. Jur. 2d Trial §1122 (1975).

It should also be noted that this case is distinguishable from West Virginia Human Rights Commission v. Tenpin Lounge, Inc., 158 W.Va. 349, 211 S.E.2d 349 (1975), which was cited by petitioner in support of its contention that a hearing on jury bias issues must be held whenever an allegation of bias arises. In that case, the court not only refused to grant a full interrogation of the jurors by the offended party's counsel, but also refused any further consideration of the alleged bias. Id. at 354. In short, that trial court had refused to take any action regarding the alleged bias of a juror. This is a very different situation from that presented in the instant case, where the trial court, in effect, allowed the

questioning of the jurors, but merely presented the inquiries herself, rather than having counsel for the parties present the questions.

The jurors' responses when polled clearly showed that the judge, and counsel, took sufficient steps to insure that the jury was not influenced by bias or prejudice and that the verdict was based solely upon the evidence. Numerous other precautions were taken by the judge to insure a fair trial. In the initial charge to the jury, the judge stated:

You must find your verdict unaided, unassisted, and uninfluenced by any personal information which you might have, and you must not permit yourselves to be guided, influenced, or swayed by sympathy or by your personal feeling regarding any of the parties.

In the final charge to the jury, the judge stated:

You are further charged that any personal opinion which you may have as to the facts not established by the evidence presented in this case,

cannot be considered by you as the basis of the verdict.

Moreover, the trial judge amended Defendant's Instruction No. 7 and added the following:

I must also instruct you that your verdict should not be based on any personal feelings such as whether you like or dislike any witness or party, or as to whether you are considering a small corporation versus a large corporation.

The judge also stated on the second page of her comments made at the conclusion of closing argument that "personal opinions not based on the evidence cannot be considered by them in reaching the verdict at trial." [Trial Transcript II, pp. 470-471]. She also stated, "And I tried to impart that in the final charge." [Trial Transcript II, p. 471].

Thus, the judge obviously felt that she had taken sufficient steps to insure a fair trial. Usually, determinations of whether a jury is biased or prejudiced are

left to the discretion of the trial judge. West Virginia Dept. of Highways v. Fisher, 289 S.E.2d 213, 218 (W. Va. 1982), cert. denied, 459 U.S. 944 (1982). Matters of qualifications of jurors are left to the discretion of the trial court and will not be disturbed, absent abuse of discretion. State v. Crouch, 358 S.E.2d 782, 785 (W. Va. 1987). It is respondent's position that the judge certainly did not abuse her discretion.

The verdict of a jury will not be set aside on appeal as contrary to the evidence if, when the evidence is viewed as a whole, there appears to be a rational basis for the verdict. Salerno v. Manchin, 158 W. Va. 220, 213 S.E.2d 805 (1974). When the jury has been fully, fairly and accurately instructed on the law of the case, and has rendered a verdict, the court will presume that they gave proper consideration to the

instructions, unless the verdict is plainly contrary to the law and the evidence. See generally Abdulla v. Pittsburgh & Weirton Bus Co., 213 S.E.2d 810 (W. Va. 1975); and Curfman v. Monongahela West Penn Public Service Co., 113 W. Va. 85, 116 S.E. 848 (1932). In the present case, the jury was fully, fairly and accurately instructed and its verdict was based solely on the evidence. Therefore, the jury's verdict herein should not be set aside, but should be upheld as a proper resolution by the finder of fact.

However, petitioner's allegation that the juror who approached the judge had a preexisting bias against it was disproven since the jurors were polled after rendering their verdict. Jurors are presumed to be impartial, absent indications to the contrary. Wells v. Murray, 831 F.2d 468, 472 (4th Cir. 1987).

Furthermore, it is within the trial judge's discretion to determine the credibility of a juror's statements of bias and prejudice. United States v. Thompson, 744 F.2d 1065 (4th Cir. 1984). Even where juror misconduct is demonstrated, which here it was not, prejudice to a party will not be presumed, but must be proved. Haight v. Goin, 346 S.E.2d 353, 355 (W. Va. 1986).

When the judge inserted the language regarding personal feelings between a small corporation and a large corporation, she cured any possible chance of unfairness to the parties in that case. Her actions were similar to a curative instruction which is usually given when inadmissible evidence is mistakenly disclosed to the jury. In such a case, evidence is cured by its being subsequently withdrawn or stricken before the close of the trial and by an

instruction given to the jury to disregard it, especially where there is other evidence upon which the verdict can be based and where there is no motion for a mistrial. Chambers v. Smith, 157 W. Va. 77, ___, 198 S.E.2d 806, 810 (1973).

The failure of the judge to immediately disclose her communication with the juror was, at most, harmless error. See W. Va. R. Civ. P. 61, Harmless Error. The West Virginia Supreme Court of Appeals will disregard and regard as harmless any error, defect or irregularity in proceedings in the trial court which do not affect the substantial rights of parties. Geary Land Co. v. Conley, 338 S.E.2d 410 (W. Va. 1985); and Syl pt. 4, McAllister v. Weirton Hospital Co., 312 S.E.2d 738 (W. Va. 1983). Appellant's rights were not affected in any way because (1) the judge took several steps to insure a fair trial, (2) the verdict

was consistent with the verdict in the first portion of the trial, and (3) the verdict was based solely on the evidence.

In light of the instructions given by the trial court to the jury, and the court's polling of each individual juror to determine the accuracy of their verdict and basis for their verdict, the trial court took adequate steps to insure a fair trial and to vouchsafe that a fair verdict was, in fact, rendered. Under these circumstances, a post-trial hearing regarding the presence of potential juror bias would have been redundant, and unnecessary. The steps taken by the trial court, in this action, were adequate to safeguard the petitioner's right to a fair trial before an impartial fact finder.

(2) THE PETITIONER'S LACK OF AN AUTOMATIC RIGHT OF APPEAL IN WEST VIRGINIA DOES NOT VIOLATE THE PETITIONER'S RIGHT TO DUE PROCESS UNDER THE UNITED STATES CONSTITUTION.

As correctly noted by the petitioner, the United States Supreme Court has previously, and repeatedly, stated that the constitution establishes no right to an appeal. See United States v. MacCollom, 426 U.S. 317 (1976); Griffin v. Illinois, 351 U.S. 12 (1956); McKane v. Durston, 153 U.S. 684 (1894). In fact, the United States Supreme Court has indicated that appellate review is not even an element of due process of law, and, consequently, there can be no constitutional right to an appeal. As stated in McKane v. Durston, supra at 687:

An appeal from a judgment of conviction is not a matter of absolute right, independently of constitutional or statutory provisions allowing such appeal. A review by an appellate court of the final judgment in a criminal case however grave the offense of which the accused is convicted, was not at common law

and is not now a necessary element of due process of law. It is wholly within the discretion of the state to allow or not to allow such a review. A citation of authorities upon the point is unnecessary.

Cited at Billotti v. Dodrill, 394 S.E.2d 32, 36 (W. Va. 1990).

The substance of petitioner's argument is that it was denied a fair trial because of the presence of alleged juror bias, and consequently that a failure to grant it an appeal will leave it with no avenue for redress of this wrong. Petitioner does not dispute that appeals in civil actions such as the instant case are granted by the West Virginia Supreme Court within their discretionary powers. However, even an exercise of discretion must comport with dictates of the due process clause of the constitution. See Evitts v. Lucey, 469 U.S. 387, 401 (1985). The question of whether West Virginia's appellate practice, and particularly its discretion

regarding the selection of cases for hearing on appeal, was considered in the case of Billotti v. Dodrill, supra. Notably, that case dealt with a defendant seeking an appeal from a murder conviction, with respect to which he had been sentenced to life without mercy, the most severe sentence possible under West Virginia law. The West Virginia Supreme Court had this to say:

An examination of our own practice of reviewing petitions for appeal reveals that, although there are 'significant discretionary elements,' the procedure comports with the due process requirements of both the federal and state constitutions.

* * *

In State v. Legg, 151 W. Va. 401, 151 S.E.2d 215, 218 (1967), this court recognized that '[o]ne convicted of a criminal offense is not entitled to a writ of error as a matter of right. The Constitution and statutes create an absolute right merely to apply for a writ of error' (emphasis added). A denial of the right, however, 'constitutes a violation of both federal and state due process

clauses and renders the conviction void.' Carrico v. Griffith, 165 W. Va. 812, 272 S.E.2d 235, 239 (1980).

Billotti v. Dodrill, supra at 37, 38.

The petitioner herein was not denied its right to apply for a writ of error or appeal. Indeed, petitioner submitted its petition for appeal to the West Virginia Supreme Court, which petition was considered and denied on April 2, 1991.

The essential elements for an opportunity to be heard in appellate procedure are as follows:

In some jurisdictions, appellate review is provided through a procedure in which the applicant seeking leave to appeal presents a petition that is considered by a panel of the appellate court; the case is heard by the court as a whole only if the panel grants the petition. So long as the procedure for application involves the essential elements of the opportunity to be heard, this type of procedure in substance resembles that in which a matter on appeal is first heard by a division of a court and then considered en banc. The essential elements of the opportunity to be heard in

appellate litigation are the rights to: (1) present the record of the proceedings below, (2) submit written argument in the form of briefs, (3) present oral argument except in cases where it has so little utility that it may justly be denied, and (4) thoughtful consideration of the merits of the case by at least three judges of the court. Procedures for appellate review that lacked these elements do not provide a true appeal of right.

ABA Appellate Standard 3.10, American Bar Association Commission on Standards of Judicial Administration: Standards Relating to Appellate Courts (1977); cited at Billotti v. Dodrill, supra at 38.

The Rules of Appellate Procedure West Virginia Supreme Court of Appeals (hereinafter W. Va. R. A. P.) provide for all of the elements cited above. The record of the proceedings below may be presented to the court pursuant to W. Va. R. A. P. 4(c) which states:

Record on Petition. The appellant shall designate by itemization to the Clerk of the Circuit Court such pleadings, orders and exhibits to enable the Supreme Court to decide the matters arising in the petition
. . . .

A companion provision for presentation of a petition without transcript of testimony is given at W. Va. R. A. P. 4A(c). Written arguments in the form of briefs regarding the petition for appeal are permitted under W. Va. R. A. P. 10(a) and (b). Such briefs were filed in this action and considered by the West Virginia Supreme Court prior to its April 2, 1991 order. Oral argument on the petition is permitted under W. Va. R. A. P. 5, and did in fact take place in this case. Consideration of the case, and whether it should be granted the discretionary full hearing on appeal, is given by all five members of the West Virginia Supreme Court. In the instant case, the request for review was denied by a vote of four to one.

Under the facts presented, the West Virginia Supreme Court's denial of petitioner's petition for appeal did not

violate petitioner's due process rights,
and petitioner, therefore, has no further
right to appeal either before the West
Virginia Supreme Court or before the
United States Supreme Court.

CONCLUSION

For all the above-stated reasons, the
respondent prays that this Court deny the
Petitioner's Petition for Writ of
Certiorari.

Respectfully submitted,

CONTRACTORS SUPPLY CORP.,
Respondent

By /s/ James F. Companion
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